but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C. in *Henderson* v. *Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd.* [1975] A.C. 581. It was, in the judgment of the Board, there described in these words:

'... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.' (p. 590)".

The attempt by way of the instant proceedings to relitigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter* v. *Chief Constable of the West Midlands Police & Ors.*[12]

The respondent also takes issue on the fact that there were two warrants of execution of sentence under section 281 of the Code and that a third may yet be issued and that this is unlawful as there cannot be two or more concurrent or consecutive warrants. This argument is wholly devoid of merit as the first warrant of execution of sentence lapsed the day before the date set for execution on the stay granted at the instance of the respondent in the first action instituted by him and so a second one was inevitable and necessary when that stay was lifted and those proceedings dismissed. This matter is in fact envisaged and provided for in section 281(d)(ii) of the Code, and in any event section 28(1) of the Interpretation and General Clauses Ordinance, 1948 specifically provides that a power conferred or a duty imposed by a written law may be exercised or performed from time to time as occasion requires.

In the premises and for the reasons discussed we find that the instant action under consideration in this appeal is wholly unmeritorious and clearly an abuse of the process of the court. We would only add by way of peroration that to approbate and sustain the *modus operandi* resorted to by the respondent, spurred on perchance by the demon of eternal hope, would not only be countenancing an abuse of process by interminable litigation in the pattern of circular tail-chasing with no forward movement but might well in the process culminate in the transmutation of the sentence of death by hanging to one of death by old age or the passage of time with perhaps attendant ancillary complications of anxiety and frustration as well for the prisoner himself along the lines!

We accordingly at the conclusion of argument allowed this appeal with costs here and below to the appellants, set aside the order of the learned Judge and struck out the action instituted by the respondent.

Order accordingly.

Solicitors: *Siva Segara & Co.*

RE SITI MARIAM BTE HAJI PAWANCHIK

[O.C.J. (Edgar Joseph Jr. J.) October 14, 1983]

[Penang – Originating Summons No. 503 of 1983]

Land Law – Mortgage – Application to delete and expunge entry of transfer of mortgage after lapse of more than 60 years from register – Effect of Limitation Act 1939, s. 18(5) – Penang and Malacca Titles (Removal of Difficulties) Order 1966, s. 13.

The applicant in this case prayed for an order that the entry relating to the transfer of mortgage dated June 7, 1920, registered in the Registry of Land Titles against her land be deleted and expunged from the register. She submitted that the Transfer of Mortgage was still shown in the records of the Registry of Land Titles as an encumbrance despite a lapse of more than 60 years. The applicant contended that the above mortgage was barred by limitation and was now unenforceable and ineffective.

Held: the Director of Land Titles or any Deputy Director should hear and determine any application the applicant may make under the provisions of section 13 of the Penang and Malacca Titles (Removal of Difficulties) Order 1966, as soon as possible, and in any case, not later than six weeks from date of receipt of the same. In the event of the application being granted, the Registrar of Titles or his Deputy will also in consequence cancel any memorial of registration of the transfer of mortgage aforesaid which may appear in the Register of Title and make such other consequential orders as may be necessary.

Cases referred to:

(1) *Othman & Anor.* v. *Mek* [1972] 2 M.L.J. 158, 160.
(2) *Holmes* v. *Cowcher* [1970] 1 W.L.R. 834.
(3) *Dingle* v. *Coppen* [1899] 1 Ch. 726.
(4) *In re Lloyd* [1903] 1 Ch. 385.
(5) *In re Marshfield* (1887) 34 Ch. D. 721.
(6) *Edmunds* v. *Waugh* (1866) L.R. 1 Eq. 418.

CIVIL SUIT.

Applicant (*ex parte*) in person.

Cur. Adv. Vult.

Edgar Joseph Jr. J. : I heard this application earlier today and made what I thought were the necessary orders and will now state my reasons for having done so.

By an *ex parte* application by Summons-in-Chambers supported by affidavit, Siti Mariam bt. Hj. Pawanchik prayed for an order that the entry relating to the transfer of mortgage dated June 7, 1920, registered in the Registry of Land Titles under Registration No. 34 Volume 500 against the lands comprised in Lot 622 (1) and 622 (2) Mk. 10 Province Wellesley South (formerly known as Lot 622 Mk. 10 P.W. South ("the lands") be deleted and expunged from the Register, and for necessary consequential orders.

The grounds upon which the application was based appeared sufficiently from the affidavit, and for convenience, I shall reproduce the material parts, shorn of introductory and formal particulars:

"1. I am one of the registered co-owners of all those pieces of lands and hereditaments known as Lots 622(1) and 622(2) Mk. 10 P.W.South (formerly known as Lot 622 Mk. 10 P.W. South) (hereinafter called the "said property"). (Copies of certified folios of the Interim Register are annexed herein marked as "Exhibit "A1" & "A2").

2. By a Statutory Mortgage dated 14/5/1913 registered No. 65 Volume 329 the said property was mortgaged by the then registered owners Mat Noh, Mah and Hajee Mohamed Arshat to one S.N.S.S. Letchumanan Chetty s/o Supramaniam Chetty.

3. The above mortgage was transferred to S.N.S.S. Shatapah Chetty vide a Transfer of Mortgage dated June 7, 1920 registered in the Registry of Land Titles under registered No. 34 Volume 500 (A certified copy of the said Transfer of Mortgage is annexed herein and marked as Exhibit "B").

4. The said Transfer of Mortgage is still shown in the records of the Registry of Land Titles as an encumbrance despite a lapse of more than 60 years.

5. I am informed and verily believe that the above mentioned mortgage is barred by limitation and is now unenforceable and ineffective.

6. I therefore pray for an Order that the said Transfer of Mortgage registered No. 34 Volume 500 dated June 7, 1920 be expunged from the records of the Registry of Land Titles, Penang and that the Registrar of Land Titles, Penang to give effect to the said Order."

In my view, the fact that the loan secured by the mortgage is statute-barred can in no way confer jurisdiction on me to make the order prayed for. "Statutes of limitation," as Ong, C.J. (Malaya) said in *Othman & Anor.* v. *Mek*,[1] "which bar the enforcement of a right by action are rules of procedure only: see 24 *Halsbury*, 3rd Ed. page 181. A right which becomes unenforceable merely by reason of limitation does not *ipso facto* perish or vanish into thin air." And, in *Holmes* v. *Cowcher*[2] Stamp, J. held, relying on an array of cases, including *Dingle* v. *Corren*,[3] *In re Lloyd*,[4] *In re Marshfield*,[5] and *Edmunds* v. *Waugh*,[6] that, although under section 18(5) of the *Limitation Act, 1939*, arrears of mortgage interest outstanding for more than six years were *irrecoverable by action*, the mortgagors nevertheless were only entitled to the equitable remedy of redemption on the terms of paying all arrears of mortgage interest, *whether statute-barred or not.*

I accordingly concluded that jurisdiction to make the order prayed for must have a statutory basis and no argument *ad inconveniendi* or on grounds of any injustice which may result by my refusing to make the order prayed for would avail the applicant. So I asked myself under what provision could I make the order prayed for?

At first glance, section 314(1) (b) of the *National Land Code* which empowers a Registrar of Titles or his Deputy, upon application made to him by, *inter alia*, any proprietor, to cancel the memorial of registration of any charge alleged to have been discharged by payment appeared to be relevant but, on closer study, section 13 of the *Penang and Malacca Titles (Removal of Difficulties) Order, 1966* ("the Order") seemed precisely in point, since I was concerned with entries relating to a transfer of mortgage in the Interim Register. Section 13 of the Order provides:

"Where in respect of replacement mortgage or replacement charge the Director is satisfied (either by reason of the fact that title deeds deposited with the mortgagee or chargee have been returned to the mortgagor or chargor or by reason of any other fact or matter) that the debt secured by the mortgage or charge has been discharged, he may cancel the endorsement of the replacement mortgage or replacement charge by means of a suitable endorsement on the relevant folio of the Interim Register."

In the result, I made an order that the Director of Land Titles or any Deputy Director do hear and determine any application the applicant herein may make under the provisions of section 13 of the Order, as soon as possible, and, in any case, not later than six weeks from date of receipt of the same.

I would add a further order by way of a rider, that in the event of the application to the Director being granted, the Registrar of Titles or his Deputy will also, in consequence, cancel any memorial of registration of the transfer of mortgage aforesaid which may appear in the Register of Title and make such other consequential orders as may be necessary.

In considering the application aforesaid, the Director or his Deputy will no doubt have regard, under "other fact or matter" in section 13 of the Order, to the extreme age of this transfer of mortgage, the fact that the loan secured by it has long since become statute-barred, the fact (if that be the case) that the mortgagee is untraceable and has at no time approached the applicant or her co-owners for repayment.

Order accordingly.

FOO SEY KOH & ORS. v. CHUA SENG SENG & ORS.

[O.C.J. (Shankar J.) February 9, 1985]

[Johor Bahru – Civil Suit No. 494 of 1983]

Practice & Procedure – Interest – Whether Subordinate Court may entertain claim where principal amount claimed is within jurisdiction but interest claimed thereon would result in cumulative figure in excess of its monetary jurisdiction – Subordinate Courts Act, 1948, ss. 65 & 67, Third Schedule, art. 21 – Civil Law Act 1956, ss. 2 & 11 – Courts of Judicature Act, 1964, First Schedule, art. 7 – R.H.C. 1980, O.42 r.12 – Subordinate Courts Rules, 1980, O.28 r.18 & O.29 r.12.

Jurisdiction – Subordinate Court – Interest – Whether Subordinate Court may entertain claim where principal amount claimed is within jurisdiction but interest claimed thereon would result in cumulative figure in excess of its monetary jurisdiction.

The court in this case was faced with a poser whether a Subordinate Court may entertain a claim where the principal amount sued for is within the jurisdiction but the interest claimed thereon would result in cumulative figure which is in excess of its monetary jurisdiction.

The total plaintiffs' claim of $22,000 plus total interest of $1,266.66 at the time of filing amounted to $23,666.66. The real dispute between the parties was whether interest should be awarded and if so at what rate, and whether the plaintiffs should have their costs on the High Court scale or on a lower court scale.

Held: (1) section 11 of the Civil Law Act 1956 and Order 28 rule 18 of the Subordinate Courts Rules empowered the court to give interest over and above the sum for which judgment is given. The period from which the interest is to run, and the rate at which the interest is to be given, in a case such as this, is purely discretionary;

(2) to expect a plaintiff to be able to compute what the interest element is going to be, working on such imponderables, and thereby to determine in which court he shall file his action could not have been the intention of the law. This, therefore, is a case where the plaintiff in this case should have initiated his action in the Sessions Court since the debt which he was suing to recover was less than $25,000;

(3) this is a case where there is every indication that the defendants wrongfully withheld the plaintiffs' money. The court would therefore award the plaintiffs interest from the date on which the cause of action arose;

(4) in view of the apparent absence of previous local guidance on this matter and the various other authorities which have been cited by the plaintiffs' counsel which appear to justify the cause of action they adopt in filing this matter in the High Court, the plaintiffs' action in continuing with the proceedings here was not unjustified.

Cases referred to:

(1) *Crossingham* v. *Park* [1928] 1 K.B. 330.
(2) *Toronto Railway Co.* v. *Corporation of the City of Toronto* [1906] A.C. 117.

CIVIL SUIT.

L. M. Ong for the plaintiffs.
C. C. Aiyathurai for the defendants.

Cur. Adv. Vult.

Shankar J. : The issue in this matter is whether a Subordinate Court may entertain a claim where the principal amount sued for is within the jurisdition but the interest claimed thereon would result in a cumulative figure which is in excess of its monetary jurisdiction.

On April 26, 1983 the plaintiffs entered into a written agreement with the defendants for the sale of some shares at a price of $120,000. $48,000 was to be paid upon execution of the agreement and the balance of $72,000 within 45 days thereafter, that is to say before June 4, 1983. The sum of $48,000 was duly paid but the balance of $72,000 was not. Instead $36,000 was paid on July 7, 1983 and a further sum of $14,000 on August 4, 1983 leaving a balance due of $22,000.

On October 1, 1983, the plaintiffs filed this action in this High Court. They claimed for the payment of the balance due of $22,000 with interest at the rate of 10% per annum from June 4, 1983 up to the date of payment and interest